Flu Pandemic: New Approaches to a New Problem

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Imagine this scenario: Shortly after returning from a trip to Southeast Asia, an agency employee complains to his manager of a respiratory infection. He does not recall visiting any agricultural areas or purchasing any raw poultry products. However, he reports that his return flight to the United States was delayed and for several hours he'd sat in a crowded airport where people were coughing and sneezing. The employee's manager agrees he should go home and rest.

Two days later, coworkers hear the employee's condition has quickly deteriorated and he's in critical condition, not responding to treatment. Coincidentally, on that same day, the World Health Organization reports a number of cases of respiratory failure, including several casualties, in a country visited by the employee. The WHO report confirms that some individuals have contracted the H5N1 virus — avian flu. The WHO statement suggests that transmission may have occurred via casual person-to-person contact, and an investigation is continuing. The agency, now concerned that H5N1 may be in its workplace, does not know what steps to take next.

The ability of viruses to mutate and the potential for a pandemic caused by new drug-resistant flu strains are cause for worry beyond the medical community. As observed in the aftermath of Hurricane Katrina, the demands placed on public employers and employees are enormous. In addition to the physical and emotional toll, the financial cost of a pandemic can be in the millions of dollars.

The number of communicable illnesses, such as avian flu and SARS, makes the release of timely and useful regulations a challenge, and issuance of non-mandatory guidelines can come too late during an outbreak. Nevertheless, employers need to prepare for any emergency affecting their employees and constituencies to the best of their abilities. This article addresses the employment law issues involved in preparing for, and responding to, a pandemic flu.

Developing an Effective Communicable Illness Program

The tasks of preparing for, and then responding to, a flu pandemic may seem overwhelming. However, there are reasonable steps to take. Preparation requires development of a communicable illness program (CIP) that provides a structure for early identification of potential outbreaks, steps to respond to emergencies, and a plan to return to business after the outbreak is contained.

The critical function of a CIP is to protect the safety and health of employees and others using the principle of "safety first." From an employment law context in California, this means the CIP must comply with any applicable CalOSHA standards; although none exists at present, an early draft is in the works. The CIP also must comply with CalOSHA's injury and illness prevention program and emergency action plan requirements.[1] These generally govern occupational safety and health concerns affected by emerging hazards and emergency circumstances. To ensure compliance with CalOSHA, the plan should address the following elements.

In a crisis, there should be no question whether the CIP applies to a particular situation.

Scope. A single CIP should cover any communicable illness or disease that poses a credible threat of transmission in the workplace. Examples include active tuberculosis, SARS, and the flu, but the policy should not be limited to currently known outbreaks. A broadly worded single program provides clarity and eliminates the need for multiple plans. In a crisis, there should be no question whether the CIP applies to a particular situation. One approach is to include all CIP provisions in an employer's existing disaster response plan because many of the same steps will be taken during a disaster.

With a CIP of broad scope, however, an employer must be careful to avoid discriminating against individuals who are disabled or perceived to be disabled. Thus, a CIP should exclude any communicable illnesses that do *not* pose a credible threat of transmission in the particular workplace (e.g., HIV in an office environment). Such exclusions will help avoid violations of the California Fair Employment and Housing Act and, with proper explanation, help alleviate employee concerns of CIP misuse.

Responsibility. The CIP should designate the individual or individuals charged with maintaining and enforcing the program. Their tasks would include monitoring communicable illness developments by reviewing information disseminated by the National Centers for Disease Control, WHO, and other news reporting services following legal developments that could require changes in the program. For example, the previously mentioned early-draft CalOSHA standard ultimately may further regulate an employer's response to transmissible diseases.

Applicable regulations and instructions. The CIP should distinguish between a strict government regulation and a non-mandatory guideline. The CIP may give the employer discretion to modify guidelines in order to best address the needs of the workplace.

Information. The plan should provide several methods for distributing information to employees. Forms of communication include distribution of printed material, email, direction to a website, posters, and training sessions. Disseminated information should include the terms of the CIP, details about illness prevention, symptoms, and recording requirements. However, where an employer must distribute information about a communicable illness suffered by one or more employees, care must be taken to protect medical confidentiality while still providing necessary details.

Universal precautions. The CIP should mandate the use of universal precautions. While every illness is different, there are certain simple, yet effective, steps that every employee can follow to minimize the potential for infection and transmission of communicable illnesses.

Frequent hand washing. Since access to soap and water is not always convenient (and some employees are allergic to antibacterial products found in some soaps), a hypoallergenic

hand sanitizer should be made available. In an office setting, this might mean distributing containers of sanitizers to work stations. In other environments, it might mean providing wall dispensers in convenient locations. Employees should be instructed to frequently wash or sanitize their hands (for example, after shaking hands, using a phone, or handling money). An employer can provide sanitizing towelettes so employees can wipe phones, chair arms, etc., before use. While this may seem excessive, it is easy to implement, and medical experts note that it is effective.

Other precautions. The fear and uncertainty generated by outbreaks of serious communicable illnesses have resulted in controversial public health responses in some countries. Employees have been forced to have their body temperature taken before entering the workplace and ordered to wear respirators or other personal protective equipment. Because each communicable illness outbreak must be evaluated on its own, we do not recommend that the CIP include such specific screening or equipment requirements. Instead, a provision could instruct the employer to determine the need for screening tools or protective equipment after a review of information from appropriate public health authorities. Discussion with legal counsel, too, is a consideration. For example, while providing optional vaccinations may be considered, mandatory vaccinations raise a host of legal concerns.

Reporting obligations raise employee concerns about privacy and confidentiality.

Minimizing exposure. It is critically important to minimize exposure to those who are ill or infectious. However, this task must be accomplished with care. A CIP should recommend that when an outbreak is suspected, employees who appear symptomatic will be sent home, pending release from a physician. The CIP also should state that employees who are ill or infectious will be encouraged to stay home.

Some employers may fear that such a provision will allow employees to abuse the policy. But that concern must be weighed against the tremendous cost of having a widespread illness in the workplace. To deter abuse, employees who misuse the policy are subject to discipline, up to and including discharge. To further minimize misuse, employers can include a policy requiring medical certification of an employee's sickness. A well-written absenteeism policy can minimize misuse. Of course, the policy must conform to all applicable leave laws (e.g., California Family Rights Act) and collective bargaining obligations.

In addition to employees who are ill, the CIP needs to consider those employees who are infectious but not yet symptomatic. For some communicable illnesses, this period may extend for a week or more. Generally, an employer's CIP should require that employees believed to be exposed to a communicable illness stay away from work until the incubation period has passed and a release to work is provided by a medical provider. Concern on the part of an impacted employee can be minimized if this incubation period is a paid absence. The CIP should specify the circumstances under which an employee will be required to stay away from work and whether the employee will be paid during this time.

Reporting requirements. A CIP should require employees to inform the employer when (a) they are diagnosed with an illness communicable in the workplace; (b) they believe they may have been exposed to a person diagnosed with a communicable illness; or (c) they recently have visited a location where there has been an outbreak of a communicable illness.

Such a reporting obligation raises employee concerns about privacy and confidentiality. A CIP should advise employees that the reported information will be kept confidential to the extent reasonably possible, but that full confidentiality cannot be guaranteed. The CIP can extend additional assurances that no retaliation will occur and that good faith reporting protocols will be followed.

Travel procedures. A CIP should note that the employer will follow the travel advisories issued by the CDC or other appropriate agencies. Distinctions can be made between work travel and personal travel. This distinction can determine whether employees are paid during a period of quarantine, as discussed below.

Return-to-work procedures. A CIP should require certification from a medical provider that it is safe for an employee to return to work after (a) being diagnosed with a communicable illness or (b) when an employee has been quarantined in association with such an illness.

Critical function requirements. Some employers may have positions that must be staffed even during an outbreak. The CIP should identify those positions. Employees who are assigned to these positions must be trained to protect themselves; this may include instruction on the use of special equipment, such as respirators or gloves.

Consistency with other policies and contractual obligations. Adopting a CIP will allow an employer to provide a safer workplace during a public health crisis. However, the CIP must be consistent with the employer's other policies and contractual obligations. Therefore, it might be necessary to change other policies — sick leave, paid time-off, disability leave, and travel policies — to harmonize them with the CIP. This can give rise to collective bargaining obligations.

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Notice. The employer should provide notice to employees of the new plan and all new procedures. For example, the CIP itself (or a reference to the CIP) can be added to the employee handbook.

Training. Last but not least, employees must be trained in the CIP. Without meaningful training, the program will not be very effective or useful.

Implications of Wage-and-Hour and Employee Benefits: Work-Related Illnesses

In addition to CalOSHA, other employment laws affect the adoption and implementation of a CIP. The following discussion highlights some of the most common concerns. (Note, however, that it assumes there is no applicable collective bargaining agreement or MOU.)

Employee is quarantined. An employee who is not ill, but who may have been exposed to a communicable illness as a result of work-related travel, may be quarantined. In that case, an employer may offer that employee a work assignment that can be performed at home. If this is not feasible or appropriate, the employer may place the employee on administrative leave. Whether that leave is paid or unpaid will depend on the employee's exempt or non-exempt status under the Fair Labor Standards Act,[2] the employer's policies, and restrictions imposed by other laws.

If the employee is nonexempt, and no sick leave, paid time-off, or vacation benefits are available, the employee may be required to take time off without pay. For the reasons discussed below, this may not be a sensible approach — especially for a short-term absence.

An employee exempt from FLSA coverage must be paid his or her salary if the employee performs any work in the workweeks in which the administrative leave occurs.[3] If an exempt employee is quarantined for a complete workweek, and performs no work during that week, the employee may not be entitled to compensation. Again, for reasons discussed below, this may not be the best approach. An exempt employee typically may choose to use sick leave, paid time-off, or vacation during this period, provided the employer's policies permit the use of such benefits.

Risks of requiring administrative leave without pay. Although it may be lawful, unpaid leave is not recommended for an employee quarantined as a result of work-related exposure. This is particularly true if the decision to quarantine is made at the employer's discretion rather than as a public health directive. California Labor Code Sec. 2802 requires an employer to indemnify an employee for all losses incurred in the discharge of his or her duties.[4] An employer's decision to quarantine an employee with a work-related illness may trigger liability under that section.

Implications of Wage-and-Hour and Employee Benefits: Non-Work Related Exposure

CIP provisions addressing non-work related exposure must address CalOSHA regulations and the various employment laws, as well as the terms of any collective bargaining agreements.

Employee becomes ill. If an employee becomes ill as a result of personal travel or other non-work-related exposure, the employee is likely to be eligible to use sick leave, paid time-off, vacation, and perhaps family and medical leave and disability leave, depending on the employer's own policies and the degree of illness. If no sick leave is available, a non-exempt employee may be required to take the time off without pay. Provided the employer has a bona fide sick-leave policy, an exempt employee who either has not yet accrued sick leave benefits or has exhausted sick leave may have his or her salary docked only for complete days of absence for illness (unless partial-day absences are required by the Family and Medical Leave Act).[5]

If the employee is placed on administrative leave for quarantine purposes, the law is unclear as to whether the leave can be without pay.

Employee is not ill, but is quarantined. If an employee is not ill but, as a result of personal travel, quarantine is (1) required by a governmental agency; (2) recommended by a governmental agency; or (3) deemed an advisable precaution by the employer, an employer should consider providing work assignments that can be performed at home.

If this is not feasible or appropriate, the employee may be placed on administrative leave. An employee may be eligible to use accrued sick leave, paid time-off, or vacation benefits if permitted by the employer's policies. If no paid leave benefits are available, a non-exempt employee may be required to take the time off without pay. As noted above, an exempt employee must be paid his or her salary if the employee performs any work in the workweek in which the administrative leave occurs. If an exempt employee is quarantined for a complete workweek, and performs no work in that week, the employee may not need to be compensated. An exempt employee may be entitled to use paid time-off benefits during this time, provided the employer's policies permit the use of such benefits for such a purpose.

Risks of requiring administrative leave without pay. If the employee is placed on administrative leave for quarantine purposes, the law is unclear as to whether the leave can be without pay. If quarantine is required by a governmental agency, it is likely, but not certain, that the leave can be without pay subject to the salary-basis rules for exempt employees noted above. If quarantine is recommended but not required by a governmental agency, it is more likely that government agencies or the courts would find that the leave must be paid. However, the law does not require that such a leave be paid. The risk of an adverse decision seemingly would be greatest if an employee is quarantined and placed on unpaid leave solely at the employer's discretion.

Employment Contracts

Collective bargaining agreements, MOUs, or other contracts of employment must be reviewed before adopting and enforcing a CIP, particularly before requiring the use of paid time-off or imposing administrative leave without pay. Such contracts may well limit the manner in which such a policy may be implemented. An employer operating under a collective bargaining agreement or MOU may also have a duty to bargain with regard to the adoption and impact of a CIP.

Disability Discrimination Law

Under the Fair Employment and Housing Act, disability-related inquiries and medical examinations of employees are limited to situations where the inquiry or examination is shown to be "job-related and consistent with business necessity."[6] Restrictions on medical inquiries and

examinations apply to all employees, not just to those with disabilities.

FEHA restrictions may be implicated when an employee is ordered to stay off work unless or until he or she can prove they do not pose a risk of contagion in the workplace. Such a requirement could be viewed as evidence that the employee is "regarded as" disabled by the employer. In addition, a request for a medical release could be viewed as an improper medical inquiry.

Generally, a disability-related inquiry or medical examination of an employee will be viewed as "job-related and consistent with business necessity" when the employer has a reasonable belief, based on objective evidence, that:

- An employee's ability to perform the essential job functions will be impaired by the medical conditions, even with reasonable accommodation; or
- The employee cannot perform the essential job functions without endangering his or her health or safety, or the health and safety of others, even with reasonable accommodation.[7]

Employers must make sure not to discriminate if the outbreak of a particular communicable illness disproportionately affects members of a protected classification.

There are three situations where an employer may want an employee who has been exposed to a communicable illness to undergo a medical examination and obtain a medical release before returning to work.

The first occurs when a public health agency quarantines an employee. There is minimal risk of violating the FEHA if the employer requires the employee to provide a medical release before returning to work. In that situation, the employer could rely on reasonable objective evidence that the employee poses a direct threat to the health of others.

Similarly, if a public health agency recommends, but does not require, that an employee be quarantined, the employer's decision to condition a return to work on a medical release would be viewed as job related and consistent with business necessity. This directive would be based on relevant objective factors, such as the recommendation of a public health agency. The information provided by the public health agency could be viewed as objectively reliable and likely to trigger a reasonable belief that returning the employee to work prematurely could pose a threat to others, but the risk of FEHA liability seems somewhat higher than in the first situation.

The third scenario is less clear. If a public health agency does not direct or recommend that an employee be quarantined, there is greater risk of liability if an employer conditions an employee's return to work on a medical release. A request that an employee submit to a medical examination or obtain a medical release before returning to work could be viewed as action based not on objective evidence, but on an unsupported assumption that someone traveling to a specific area would be infected with avian flu. Unless there is other objective evidence, e.g. the person is showing some symptoms of the illness, such a directive carries a risk that it will be unlawful. Of course, much will depend on the seriousness of the outbreak and what is known about it. The more serious the pandemic and the less that is known about it, the more discretion will be given to employers to take reasonable precautionary steps to protect employee safety and health.

Discrimination on the Basis of Other Protected Classifications

It is possible that the outbreak of a particular communicable illness might disproportionately affect members of a protected classification (e.g., race or national origin, depending on the geography of the outbreak). Employers must be cognizant of this and ensure they are not discriminating against such groups. Evidence may better withstand criticism if an employer can show that it has adopted a CIP which covers all communicable illnesses, not

just one that disproportionately affects a protected group. Examples of nondiscriminatory enforcement also will be important.

Conclusion

Much can be done to effectively respond to a pandemic flu and protect the safety and health of employees and others. However, an effective response depends on preparedness *before* an emergency occurs. An employer with a fully developed communicable illness program following the steps described in this article will have an advantage in providing a quick and effective response to a most serious situation. ❋

1 Title 8, Cal. Code of Regs. Secs. 3203 and 3204.
2 29 USC Secs. 201 et seq.
3 See 29 CFR Sec. 541.602.
4 See Cal. Lab. Code Sec. 2802 ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties….")
5 See 29 CFR Sec. 541.602.
6 See Gov. Code Sec. 12940(f).
7 See Gov. Code Sec. 12940(a)(1).